A

Enthiran a/l Rajoo v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–27–02 OF 2014
MOHTARUDIN BAKI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
3 SEPTEMBER 2015

C

Criminal Law — Penal Code — s 300 — Murder — Appeal against conviction and sentence — Defences — Whether act of deceased was sufficient to constitute grave and sudden provocation in law — Whether act of retaliation by appellant was out of proportion to provocation received — Whether appellant was D *acting in self defence — Whether appellant's failure to raise defence at earliest possible stage rendered it an afterthought — Whether appellant could rely on exceptions 1, 2 and 4 to s 300 of the Code — Whether this defence of sudden fight raised for first time at defence stage — Whether there were appealable errors* E *— Whether appellate intervention necessary*

Evidence — Burden of proof — Reliance on Exceptions 1, 2 and 4 of s 300 of the Penal Code — Whether appellant had to bear burden of proving applicability of exceptions on a balance of probabilities

F

On 20 August 2011 the body of Asokhumaran a/l Mani ('the deceased') was found lying in a dried-up ditch. The forensic expert who conducted the post mortem identified seven external injuries and attributed the cause of death due to one severe injury to the neck caused by blunt trauma. Police investigation led G to the arrest of the appellant. During the course of the investigation the appellant admitted to hitting the deceased with a hammer before leading the police to his house, where a hammer was recovered as the murder weapon. The chemist confirmed that the DNA profile of the blood stain recovered from the hammer matched the deceased's DNA profile. The appellant was charged with H the murder of the deceased, an offence under s 302 of the Penal Code. It was the prosecution's case that on 19 August 2011, the deceased had arrived at the appellant's house at about 11pm, while the appellant had been watching television with his children. The accused and the deceased had consumed a bottle of whisky the deceased had brought along. At about midnight the I appellant's children, a girl and a boy had retired to their respective rooms to sleep. However, the deceased and the appellant had continued consuming liquor until they were both drunk. As the deceased was too drunk to go back home, he had stayed the night with the appellant. Both the deceased and the appellant had slept in the hall. However, when the appellant woke up in the

night he had found the deceased in his daughter's room. The appellant claimed that he was so enraged by the deceased attempting to rape his daughter that he had beaten him with the hammer and then thrown his body into the ditch. The trial judge found that the prosecution had established a prima facie case against the appellant upon the s 302 charge and ordered him to enter his defence. The appellant claimed that he had been very drunk on the night of the incident; that he had acted upon a grave and sudden provocation upon witnessing the deceased in a state of undress attempting to rape his daughter; and that he had acted in self defence upon being assaulted by the deceased with a steel chair in the course of the fighting. The trial judge found that the appellant could not rely on the defence of intoxication, self defence or defence of sudden and grave provocation. The trial judge also found that the defence had failed to raise a reasonable doubt upon the prosecution's case. Consequently the appellant was found guilty, convicted of the offence of murder and sentenced to death. This was the appellant's appeal against that conviction and sentence. In this appeal the appellant relied on exceptions 1, 2 and 4 of s 300 of the PC to show that he was removed from the ambit of s 302 of the PC. As such the appellant urged for the reduction of his charge to one under s 304(a) of the PC.

Held, dismissing the appeal:

(1) The appellant's reliance on exceptions 1, 2 and 4 of s 300 of the PC meant that by s 105 of the Evidence Act 1950, he had to bear the burden of proving the applicability of the exceptions on a balance of probabilities (see para 10).

(2) The issue as to whether exception 1 of s 300 of the PC applied, ie whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, was a question of fact. Additionally there had to be proportionality in the nature of the retaliation vis-à-vis the provocation created. In the present case, it was not disputed that the appellant found the deceased lying next to his daughter on her bed. However, the fact that the deceased was shirtless and his trousers unzipped while he was attempting to rape the appellant's daughter was contradicted by the testimony of the daughter herself, who said that she was not molested by the deceased. Additionally she had neither said anything about the deceased's state of undress nor been cross-examined on this aspect of the evidence. It is trite law that when there was a failure to cross-examine on a certain aspect of the prosecution case it could be equated to an admission. Hence at the highest it could be safely inferred that the appellant had only seen the deceased lying next to his daughter on her bed without the overt acts as particularised by him. That being the case, the facts taken together in their entirety and not in isolation could not amount to sudden and grave provocation (see paras 11 & 14–17).

(3) Thus the trial judge was right in finding that the act of the deceased was insufficient to constitute a grave and sudden provocation in law. The trial judge was also correct when he found that even if there was grave and sudden provocation, the act of retaliation by the appellant was out of proportion to the provocation received. In any case, the appellant testified that he had beat the deceased with the hammer in self defence when the deceased struck him with the steel chair. Hence it was obvious that the beating of the deceased had nothing to do with issues of grave and sudden provocation. On this ground alone the defence of grave and sudden provocation should fail (see paras 20–23).

(4) The trial judge was right to have rejected the appellant's reliance on exception 2 of s 300 of the PC, namely acting in self defence, as an afterthought because it was never put across to the prosecution witnesses but only revealed during the defence stage. Such failure by the appellant to put his case forward at the earliest possible stage would render the same to be likened to an afterthought or recent invention. In any case, even if the exception applied, on the facts, the appellant had inflicted more harm than it was necessary to inflict for the purpose of defence. In cross-examination the appellant had testified that the deceased had lost consciousness after the first blow with the hammer. That being the case, the appellant not being in any impending peril to his life could have retreated. However, the appellant had inflicted further blows upon the deceased causing his eventual death. The appellant was thus no longer acting in self defence and his reliance on exception 2 of the PC should fail (see paras 27–29 & 34–38).

(5) The appellant's reliance on exception 4 of s 300 of the PC also suffered the same deficiencies as was his reliance upon exception 1 and 2. This mode of defence was raised for the first time only at the defence stage and the appellant failed to avail himself of the opportunity to put his material case in cross-examination of the prosecution witnesses. More importantly there was no evidence of any heated quarrel before the fight and the appellant had taken undue advantage of the situation to act in a very cruel manner. In the circumstances, there were no appealable errors to warrant any appellate intervention (see paras 40 & 42).

[Bahasa Malaysia summary

Pada 20 Ogos 2011 mayat Asokhumaran a/l Mani ('si mati') telah dijumpai terbaring dalam longkang yang kering. Pakar forensik yang menjalankan bedah siasat telah mengenal pasti tujuh kecederaan dalaman dan menganggap sebab kematian diakibatkan oleh satu kecederaan teruk di leher disebabkan oleh trauma mengejut. Siasatan polis membawa kepada tangkapan perayu. Sepanjang siasatan dijalankan perayu mengaku telah memukul si mati dengan penukul sebelum membawa polis ke rumahnya, yang mana satu penukul ditemui sebagai senjata pembunuhan. Ahli kimia mengesahkan bahawa profil

DNA untuk kesan darah yang ditemui pada penukul sepadan dengan profil DNA si mati. Perayu telah dituduh membunuh si mati, satu kesalahan di bawah s 302 Kanun Keseksaan ('KK'). Ia adalah kes pendakwaan bahawa pada 19 Ogos 2011, si mati telah tiba di rumah perayu lebih kurang pada pukul 11 malam, manakala perayu sedang menonton televisyen dengan anak-anaknya. Tertuduh dan si mati telah minum sebotol wiski yang dibawa oleh si mati. Lebih kurang tengah malam anak-anak perayu, seorang perempuan dan seorang lelaki telah masuk bilik masing-masing untuk tidur. Walau bagaimanapun, si mati dan perayu sambung minum arak sehingga mereka berdua mabuk. Oleh kerana si mati terlalu mabuk untuk pulang ke rumah, dia telah bermalam di rumah perayu. Kedua-dua si mati dan perayu telah tidur diruang tamu. Walau bagaimanapun, apabila perayu bangun malam itu dia dapati si mati dalam bilik tidur anak perempuannya. Perayu mendakwa bahawa dia menjadi sangat marah dengan percubaan si mati untuk merogol anak perempuannya sehingga dia memukul si mati dengan penukul dan kemudian membuang mayat si mati dalam longkang. Hakim perbicaraan mendapati pendakwaan telah membuktikan kes prima facie terhadap perayu berdasarkan pertuduhan s 302 dan memerintahkannya memasuki pembelaannya. Perayu mendakwa bahawa dia sangat mabuk pada malam kejadian; bahawa dia bertindak atas provokasi secara tiba-tiba apabila melihat si mati tidak berbaju sedang cuba merogol anak perempuannya; dan bahawa dia telah bertindak untuk mempertahankan diri apabila diserang oleh si mati dengan kerusi besi semasa bergaduh. Hakim perbicaraan mendapati perayu tidak boleh bergantung kepada pembelaan mabuk, mempertahankan diri atau pembelaan provokasi secara tiba-tiba. Hakim perbicaraan juga mendapati pembelaan telah gagal menimbulkan keraguan munasabah atas ke pendakwaan. Akibatnya perayu didapati bersalah, disabitkan kesalahan membunuh dan dihukum mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Dalam rayuan ini perayu bergantung kepada pengecualian 1, 2 dan 4 kepada s 300 KK untuk menunjukkan bahawa dia telah dikeluarkan daripada skop s 302 KK. Oleh itu perayu menggesa untuk pengurangan dalam pertuduhannya kepada di bawah s 304(a) KK.

Diputuskan, menolak rayuan:

(1) Kebergantungan perayu tentang Pengecualian 1, 2 dan 4 kepada s 300 KK bermaksud bahawa melalui s 105 Akta Keterangan 1950, dia mempunyai beban untuk membuktikan pemakaian pengecualian tersebut atas imbangan kebarangkalian (lihat perenggan 10).

(2) Isu-isu tentang sama ada Pengecualian 1 kepada s 300 KK adalah terpakai, iaitu sama ada provokasi adalah tiba-tiba mencukupi untuk mengelak daripada kesalahan yang merupakan pembunuhan, adalah persoalan fakta. Selain itu perlu ada keseimbangan dalam bentuk tindakan balas vis-à-vis provokasi yang direka itu. Dalam kes ini, ia tidak dipertikaikan bahawa perayu mendapati si mati berbaring di sebelah

anak perempuannya di atas katilnya. Walau bagaimanapun, hakikat bahawa si mati tidak berbaju dan zip seluarnya terbuka ketika dia cuba merogol anak perempuan perayu telah disangkal oleh keterangan anak perempuan itu sendiri, yang mengatakan bahawa dia tidak dicabul oleh si mati. Selain itu dia tidak menyatakan apa-apa tentang keadaan si mati tidak berbaju ataupun diperiksa balas tentang aspek keterangan ini. Adalah undang-undang lapuk jika berdapat kegagalan untuk memeriksa balas tentang aspek tertentu kes pendakwaan ia boleh disamakan dengan pengakuan. Justeru ia boleh dianggap selamat untuk disimpulkan bahawa perayu hanya melihat si mati berbaring di sebelah anak perempuannya di atas katilnya tanpa perbuatan yang terang-terangan seperti yang dikhususkan olehnya. Jika begitu, fakta-fakta yang diambil bersama secara keseluruhan dan bukan secara berasingan tidak boleh membentuk provokasi secara tiba-tiba (lihat perenggan 11 & 14–17).

(3) Oleh itu hakim perbicaraan adalah betul dalam penemuan bahawa tindakan si mati tidak mencukupi untuk membentuk provokasi secara tiba-tiba dari segi undang-undang. Hakim perbicaraan juga betul apabila beliau mendapati jikapun terdapat provokasi secara tiba-tiba, tindakan tindak balas oleh perayu tidak seimbang dengan provokasi yang diterima. Dalam apa kes sekalipun, perayu memberi keterangan bahawa dia telah memukul si mati dengan penukul untuk mempertahankan diri apabila si mati memukulnya dengan kerusi besi. Justeru adalah jelas bahawa pukulan si mati tiada kaitan dengan isu provokasi secara tiba-tiba. Atas alasan ini sahaja pembelaan provokasi secara tiba-tiba patut gagal (lihat perenggan 20–23).

(4) Hakim perbicaraan adalah betul untuk menolak kebergantungan perayu tentang Pengecualian 2 kepada s 300 KK, iaitu bertindak mempertahankan diri sebagai suatu yang difikirkan kemudian kerana ia tidak pernah dikemukakan kepada saksi-saksi pendakwaan tetapi hanya dikemukakan semasa peringkat pembelaan. Kegagalan sebegitu oleh perayu untuk meletakkan kesnya di peringkat seawal mungkin akan mengakibatkan yang sama untuk disertakan dengan sesuatu yang telah difikirkan kemudian atau baru direka. Walau apa pun, meskipun pengecualian adalah terpakai, atas fakta-fakta, perayu telah menyebabkan lebih banyak keburukan daripada yang perlu untuk dikenakan bagi tujuan mempertahankan diri. Dalam pemeriksaan balas perayu telah memberi keterangan bahawa si mati tidak sedarkan diri selepas pukulan pertama dengan tukul itu. Sebab itu, perayu tidak berada dalam apa-apa keadaan yang membahayakan nyawanya boleh berundur. Walau bagaimanapun, perayu telah terus memukul si mati sehingga akhirnya menyebabkan kematiannya. Perayu dengan itu tidak lagi bertindak untuk mempertahankan diri dan kebergantungannya kepada Pengecualian 2 patut gagal (lihat perenggan 27–29 & 34–38).

(5) Kebergantungan perayu kepada pengecualian kekurangan sama seperti kebergantungannya kepada pengecualian 1 dan 2. Cara pembelaan itu telah dikemukakan buat kali pertama hanya pada peringkat pembelaan dan perayu gagal untuk memberi dirinya peluang untuk mengemukakan kes materialnya dalam pemeriksaan balas saksi-saksi pendakwaan. Lebih penting lagi tiada keterangan tentang apa-apa pertengkaran hangat sebelum pergaduhan dan perayu telah mengambil kesempatan yang tidak sepatutnya dalam keadaan itu untuk bertindak dengan cara yang sangat kejam. Dalam keadaan ini, tidak ada kesilapan boleh dirayukan untuk mewajarkan apa-apa campur tangan rayuan (lihat perenggan 40 & 42).]

Notes

For cases on s 300 of the Penal Code, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 2090–2120.

For cases on burden of proof in general, see 7(1) *Mallal's Digest* (5th Ed, 2015) paras 653–1032.

Cases referred to

Abdul Razak bin Dalek v PP [2010] 4 MLJ 725; [2010] 6 CLJ 357, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Asogan Ramesh s/o Ramachandren & Ors v PP [1998] 1 SLR 286, CA (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Ikau Anak Mail v PP [1973] 2 MLJ 153, FC (refd)
Koh Swee Beng v PP [1991] 3 MLJ 401, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ (Rep) 162, SC (refd)
Nanavati v State of Maharastra AIR 1962 SC 602, SC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Teoh Seng Lian v PP [1986] 1 MLJ 474, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Evidence Act 1950 s 105
Penal Code ss 85(2), 96, 99, 99(4), 300, 302, 304(a)

Appeal from: Criminal Trial No 45–16–05 of 2012, High Court of Pulau Pinang.

Anthony Samy (Jaafar Abdullah with him) (Aziz, Anthony & Co) for the appellant.

Fairus (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] The appellant was charged as follows:

> Bahawa kamu pada 20/8/2011, jam lebih kurang 3.00 pagi bertempat di rumah No 15, SS3, Lorong 10, Taman Tasik Mutiara, Simpang Ampat, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang, telah didapati menyebabkan kecederaan hingga menyebabkan kematian terhadap Asokhkumaran a/l Mani, No K/P 800918–07–5707. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The trial judge ordered the appellant to enter his defence upon proof of a prima facie case being established against him. At the end of the defence, the appellant was found guilty of the offence and was convicted of the same. He was sentenced to death.

[3] The appeal before us was in respect of the said conviction and sentence. After due consideration of the issues raised, we dismissed the appeal. We now give our grounds.

THE CASE FOR THE PROSECUTION

[4] The narratives are as follows:

(a) The deceased came alone to the appellant's house as indicated in the charge on 19 August 2011 at about 11pm on a motorcycle. At the material time the appellant was at home together with his two children, SP12 (Sathia Hari a/l Enthiran) and SP13 (Logeswari a/p Enthiran). All three were then in the hall watching television. The deceased joined them. The appellant and the deceased proceeded to consume liquor in the presence of the siblings. SP13 later went to bed. She was unaware of the time. The siblings slept in separate rooms. Both the appellant and the deceased were still drinking in the hall when the siblings left them to go to bed.

(b) SP13 testified further that:

> Sedang saya tidur saya dengar bapa saya menjerit dan lampu bilik terbuka. Saya terjaga dari tidur. Saya dapati uncle itu ada bersebelahan saya. Uncle itu ialah kawan bapa saya bernama Asokh (si mati). Bapa saya menjerit dengan menggunakan perkataan 'ooi-ooi!'. Reaksi bapa saya dalam keadaan marah.
>
> Asokh (si mati) takut dengar bapa saya menjerit dan dia terus keluar dari bilik. Saya tidak tahu apa yang berlaku selepas itu.

Saya hanya dengar bunyi. Bunyi lontaran barang yang perlahan. Saya dengar bapa saya menengking kawan bapa saya.

Saya tidak dicabul oleh Asokh setelah saya sedar dia berada di sebelah saya.

(c) At about 8.55am (20 August 2011), SP3 (Corporal Mat Fizi bin Din) who was on duty at Pejabat Pertanyaan, Balai Polis Simpang Ampat, received a telephone call from a member of the public (SP14, Tan Chor Soon) pertaining to the discovery of a dead body resembling an Indian male (later identified as the deceased) in a dried-up ditch (*parit kering yang agak semak*) not far from an Indian temple at Jalan 3 Kongsi, Simpang Ampat.

(d) The investigating officer ('IO') of the case, SP15 (ASP Jaimi b Husin), who arrived at the scene at about 9.20am proceeded to examine the deceased. He noticed circular shape injuries on the front part of the neck of the deceased. He also found a purse containing a national registration identity card bearing the name of Asokhumaran a/l Mani from the rear pocket of the jeans worn by the deceased. The deceased was later taken to Hospital Seberang Jaya for an investigation to determine the cause of his demise.

(e) SP9 (Dato' Dr Zahari Noor, the forensic expert/consultant) conducted the post mortem on the deceased on the same day. His report is exh P22. He identified seven external injuries, the most serious being injury No 1 which is:

1. Luka calar dan lebam berganda berbentuk bulat dan separa bulat dan 'overlapping' pada pangkal leher hadapan hingga ke atas leher lebih pada sebelah kanan, berukuran garis pusat 2.5cm hingga 3cm. Kesemua luka-luka ini berdekatan di antara satu sama lain dan bilangan yang dikira lebih kurang 13 kesemuanya.

(f) The external injuries Nos 2–7 did not cause internal injuries and the same could have been caused when the deceased was restrained.

(g) SP9 attributed the cause of death due to injuries to the neck caused by blunt trauma (*kecederaan dalam leher yang disebabkan oleh trauma tumpul*). He concluded that:

berdasarkan kepada kecederaan-kecederaan yang dialami si mati, beliau telah dipukul atau dihentam berkali-kali dengan jenis senjata tumpul berbentuk bulat pada hujung dan dilakukan pada bahagian leher beliau.

Akibatnya berlaku pendarahan ke dalam salur pernafasan hingga membawa kematian. Kebiasaannya kecederaan seperti ini akan menyebabkan kematian. Pada lazimnya kecederaan yang dialami oleh si mati akan menyebabkan kematian.

(h) SP-9 further confirmed from exh P31A (hammer) that *'sekiranya hujung*

penukul ini berbentuk bulat, maka senjata ini bersesuaian dengan kecederaan yang dialami oleh si mati'.

(i) The deceased was identified by his brother, SP5 (Sivaringam a/l Mani) and the IO, SP15.

(j) On 21 August 2011, SP7 (Sarjan Major Zakaria Darus, Timbalan Ketua Polis Balai, Balai Polis Simpang Ampat) recovered a Kriss Modenas motorcycle bearing registration number PET 277 from Sungai Kuala Tasik Simpang Ampat, about 4km away from the location of the discovery of the deceased body. SP5 confirmed that the said motorcycle was his and the deceased had borrowed the same prior to his death.

(k) The appellant was arrested by SP8 (Insp Nazri bin Abd Rahim) on 22 August 2011 at his father's house, at Blok C4-17, Lorong Tenggiri Satu, Seberang Jaya, Perai, Pulau Pinang. He was taken to IPD Seberang Perai for further investigation.

(l) SP8 alluded that during the course of the investigation, the appellant told him, *'Tuan, saya boleh tunjuk tukul besi yang berada di rumah saya'*. Based upon the information given and led by the appellant, SP8 proceeded to the appellant's house (as indicated in the charge) and recovered a hammer ('exh P31A') in one of the drawers of the kitchen cabinet, as pointed by the appellant.

(m) SP10 (Padillah bt Yahya, the chemist) confirmed that the DNA profile of the blood stain recovered from the hammer ('exh P31A') matched with the DNA profile developed from the blood stain specimen of the deceased.

FINDING OF THE TRIAL JUDGE END OF PROSECUTION'S CASE

[5] The trial judge found that the prosecution had established a prima facie case against the appellant upon the charge proffered against him within the requirements of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457. Henceforth the appellant was ordered to enter his defence.

[6] It is pertinent to note that the defence conceded that the trial judge was correct in ordering the appellant to enter his defence for the reason that based on the evidence, the burden had shifted to the appellant under s 105 of the Evidence Act on account of the reliance by the appellant on the exceptions under s 300 of the Penal Code to account for his deeds.

THE CASE FOR THE DEFENCE

[7] The appellant posited the following:

(a) The deceased came alone to the appellant's house on 19 August 2011 at about 10pm on a motorcycle. They were friends from their school days. The deceased was drunk (*mabuk*) and brought along a bottle of whisky with him. Prior to that date, the appellant had never drank with him.

(b) The appellant and the deceased proceeded to drink whisky in the hall in the presence of both the appellant's children, SP12 and SP13. At about 12 midnight both children retired to bed.

(c) When the whisky was completely consumed, both the appellant and the deceased went out and bought more liquor and food and returned to the house. They resumed drinking until it finished. Both ended drunk. The deceased then told the appellant that he could not go back home as he was drunk.

(d) The appellant then gave a pillow to the deceased and the deceased slept on the sofa in the hall. The appellant slept on the floor below the sofa. It was then about 2am.

(e) The appellant later woke-up from his sleep. The light in the hall was on. The deceased was not on the sofa. He went to look for the deceased. He found the deceased beside SP13 on SP13's bed in SP13's room. The light in the room was on.

(f) The appellant testified that he saw the deceased without his shirt and the zip of his trousers opened and the trousers drawn down to his thighs (*seluar itu terlondeh hingga ke peha*). The deceased tried to rape his daughter (*cuba rogol anak perempuan saya*) and also tried to touch (*menyentuh*) her. The appellant continued at p 158, RR:

> Saya menjerit dan memarahi Asokhkumaran dengan perkataan yang kasar. Asokhkumaran terkejut mendengar jeritan saya itu dan beliau memakai seluar dan lari dari bilik Logeswari. Dia melarikan diri dengan merempuh saya. Dia melarikan diri ke arah ruang tamu.
>
> Masa itu saya dan Asokhkumaran bergelut dan bergaduh di ruang tamu. Maksud bergaduh ialah saya telah bertumbuk dengan Asokhkumaran. Asokhkumaran telah memukul saya dengan topi keledar. Topi keledar berada di ruang tamu. Topi keledar itu kepunyaan Asokhkumaran. Sambil saya bergaduh dan bertumbuk serta melemparkan barang-barang di ruang tamu, kami berdua menuju ke dapur. Barang-barang yang dilempar adalah kerusi dan baseball bat kepunyaan Sathiya Hari (anak saya).
>
> Di ruang dapur, Asokhkumaran memegang kerusi dan saya ambil tukul dari dapur dan saya memukul Asokhkumaran. Saya ambil tukul besi dari dalam laci. Asokhkumaran pukul saya dengan kerusi dan saya pula membalas

dengan memukulnya dengan tukul besi. Pada masa itu, Asokhkumaran pengsan. Saya rasa takut melihat keadaannya itu.

Saya angkat Asokhkumaran masuk ke dalam kereta saya dan saya memandu kereta saya itu dan saya buang Asokhkumaran ke dalam longkang.

Saya menggunakan tukul besi dengan memukul Asokhkumaran di dapur kerana tukul besi itu sahaja yang saya dapat mempertahankan diri saya. Kerusi yang digunakan oleh Asokhkumaran memukul saya adalah kerusi besi.

Saya telah ditangkap oleh polis pada 22.8.2011. Tukul besi yang saya pukul Asokhkumaran, saya telah simpan balik dalam laci di dapur. Setelah ditangkap saya ada menunjukkan tukul besi ini kepada polis. Pihak polis rampas tukul besi ini. Saya boleh cam tukul besi ini.

(g) In essence, the appellant:

(i) did not deny that he had beaten the deceased by using the hammer (*tukul besi*);

(ii) did not deny that he threw the deceased's body into the ditch; and

(iii) did not deny that he had thrown the deceased's motorcycle into the river.

(h) The appellant also alluded that:

(i) he was drunk after the drinking binge with the deceased on the night of the incident;

(ii) he acted upon a grave and sudden provocation upon witnessing the deceased shirtless and his trousers drawn down, attempting to rape his daughter, SP13;

(iii) he was acting in self-defence upon being assaulted by the deceased with a steel chair (*kerusi besi*) in the course of the fighting which extended to the kitchen area; and

(iv) he struck the deceased only once (in cross-examination) with the hammer rendering the deceased unconscious and it happened out of a sudden fight with the deceased.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[8] In essence, the trial judge found that the defence of intoxication under s 85(2) of the Penal Code ('the PC') was devoid of any merit on account that his state of intoxication was not forced upon him and upon the appellant's admission in cross-examination that he was no longer drunk at the time he found the deceased on SP13's bed. His Lordship also found that the appellant cannot avail himself to the exercise of the right of private defence under s 96 of

the PC as the appellant had exceeded the limits of the exercise of such right when he inflicted at least 13 blows upon the deceased by using the hammer as found by SP9. Equally the trial judge found that the defence had failed to discharge the burden that Exception 1 (defence of sudden and grave provocation) and Exception 4 (defence of sudden fight in the heat of passion upon a sudden quarrel) of s 300 of the PC operates in his favour in all the circumstances of the case. The defence too had failed to raise a reasonable doubt upon the prosecution's case.

The appellant was found guilty and convicted of the offence as proffered and was sentenced to death.

THE APPEAL BEFORE US

[9] Counsel for the appellant submitted that:

(a) The whole event leading to the killing of the deceased emanated from the grave and sudden provocation caused when the appellant saw the deceased on the bed lying beside his daughter, SP13. The deceased was then without his shirt and had his trousers drawn down to his thighs and the zip of the trousers opened. The appellant thought that the deceased was about to rape his daughter when he also saw the deceased trying to touch SP13. The appellant then shouted and abused the deceased. The deceased proceeded to push aside the appellant and ran out of the room.

From the facts enumerated above, counsel submitted that it could be safely presumed that the appellant was in a grave and sudden provocation state. The facts and circumstances could easily have caused grave and sudden provocation particularly for a person of his class (lorry driver). Exception 1 of s 300 of the PC clearly applies to operate in favour of the appellant.

(b) There was further aggravation when the deceased ran away from the room by pushing away the appellant and both ended fighting in the hall. The fight moved towards the kitchen where the deceased struck the appellant with a steel chair and the appellant defended himself by beating the deceased with a hammer, which was the only thing he could use to defend himself. The appellant beat the deceased with the hammer because he 'ingin mempertahan diri saya'. Patently exception 2 of s 300 of the PC applies to account for his deeds.

(c) While the appellant was still in a state of grave and sudden provocation, there was a sudden fight in the heat of passion upon a sudden quarrel without premeditation and without taking undue advantage that caused the death of the deceased, thereby precipitating the invocation of Exception 4 of s 300 of the PC into motion.

(d) The overlapping defences of the appellant under exceptions 1, 2 and 4 of

s 300 of the PC had been recognised by the Supreme Court in *Teoh Seng Lian v Public Prosecutor* [1986] 1 MLJ 474 at p 476. We have no quarrel with him on this issue.

(e) The appellant's defence may appear to be too far-fetched and ought to be rejected, but the defence appears to constitute a lesser offence than murder or may even be lesser than culpable homicide, particularly, as in this case, the beating was on the lower part of the neck, and not on the vital part such as the head. This the trial judge ought to consider but failed to do so.

On these grounds counsel submitted that there was genuine doubt as to whether or not the case falls within one of the exceptions. Counsel urged for the reduction of the charge to one under s 304(a) of the Penal Code.

OUR FINDINGS

[10] As submitted by counsel, the appellant relied on Exceptions 1, 2 and 4 of s 300 of the PC. By s 105 of the Evidence Act 1950, the burden is shifted and is now upon the appellant to prove the applicability of the said Exceptions and the burden is discharged on a balance of probabilities – see *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153.

DEFENCE OF GRAVE AND SUDDEN PROVOCATION UNDER EXCEPTION 1

[11] Exception 1 of s 300 of the PC provides:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person, by mistake or accident.

There are riders to the exception but is of no particular relevance for our present purpose herein. The explanation to the exception further provides that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[12] The Supreme Court in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ (Rep) 162 laid down that '... the test of 'grave and sudden' provocation is whether a reasonable man, belonging to the class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self control (see *Nanavati v State of Maharastra* AIR 1962 SC 602) ...'

[13] The Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 reiterated that the question whether the provocation was grave and sudden enough such as to make the accused to lose

his self control is a question of fact and not law and that it is not enough to show that the accused was provoked in losing his self control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness, caused a reasonable man to lose his self control and induced him to do the act which caused the death of the deceased. Equally the provocation must not be sought by the offender.

[14] Additionally there must be proportionality in the nature of the retaliation vis-a-vis the provocation created. Hence the nature of the retaliation by the accused having regard to the nature of the provocation may also be considered with other factors to determine its sufficiency of constituting sufficient provocation to reduce the charge of murder to culpable homicide not amounting to murder. If the act of retaliation is wholly out of proportion with the provocation created or offered, then the plea of grave and sudden provocation must fail – see also *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725; [2010] 6 CLJ 357; *Koh Swee Beng v Public Prosecutor* [1991] 3 MLJ 401.

[15] It is not disputed that the appellant found the deceased lying next to SP13 on SP13's bed. However, the appellant departed from the prosecution's narratives when he alleged that the deceased was without his shirt and his trousers drawn down to his thighs with the zip opened and attempting to touch/rape SP13. Nevertheless, this evidence was contradicted by the testimony of SP13 herself who said that she was not molested (*dicabul*) by the deceased. Additionally she said nothing about the deceased being shirtless and had his trousers drawn down to his thighs and the zip opened. She was not cross-examined on this aspect of the evidence though. Now, the law is trite that where there is a failure to cross-examine on certain aspect of the prosecution case, it can be equated to an admission – see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212. Hence at the highest, it can be safely inferred that what the appellant saw on the said instant was the deceased merely sleeping/lying next to SP13 on SP13's bed without the overt acts as particularised by the appellant. That being the scenario, viewed objectively from the reasonable man's perspective, can this then amount to grave and sudden provocation?

[16] The trial judge adverted to the testimony of SP13 enumerated above and after considering that the issues of the attempted rape, the touching of SP13's person and the deceased being shirtless and had his trousers drawn-down to his thighs were mere afterthought as the same were not suggested to the prosecution witnesses, found that the act or conduct of the deceased did not occasion a grave and sudden provocation such that it would have deprived a reasonable man of the power of self-control. His Lordship opined:

A Dalam keadaan atau situasi begini, sudah pasti seseorang yang bersikap munasabah akan mengenal pasti apa yang berlaku dahulu sebelum mengambil apa-apa tindakan melulu. Dalam kes ini OKT langsung tidak bertanya pada si mati atau SP-13 apa yang berlaku tetapi terus bertindak ganas terhadap si mati. Seseorang yang bersikap munasabah mungkin berasa curiga dalam keadaan sedemikian tetapi
B ia tidak cukup untuk melucutkan kuasa kawal dirinya.

[17] We were entirely with His Lordship. Though the appellant must have been upset or angry by what he saw, ie the conduct of the deceased lying/sleeping next to SP13 on SP13's bed, we do not think that these facts
C taken together in its entirety and not in isolation, can amount to grave and sudden provocation.

[18] Apart from lying/sleeping on bed next to SP13, there was nothing in the
D conduct of the deceased that was so provocatively grave as to render the appellant or for that matter a reasonable man to succumb to his violent primordial passion, bearing always that the deceased was fully clothed at the material time (as disclosed by the testimony of SP13). Additionally, though the deceased was shouted at and verbally abused thoroughly by the appellant, he
E did not snap nor retaliate nor rub salt into the wound, but did the right thing by opting to leave the room quickly and keeping his mouth shut. He did not exacerbate the appellant's apparent anger.

[19] In all the circumstances of the case, we opined that a reasonable man
F similarly circumstanced could not have been so provoked as to lose his self-control and beat the deceased into a pulp in the manner he did. Additionally, a reasonable man sharing the same cultural, educational, vocation and religious background and upbringing with the appellant would have exercised self-restraint to contain the situation from getting out of control. All
G the more so when they have been friends from their school days and have been drinking together barely hours earlier.

[20] Having considered the evidence in its entirety, we were on all fours with the findings of the trial judge that the act/conduct of the deceased was
H insufficient to constitute a grave and sudden provocation in law and hence disentitling him from being removed from the ambit of s 302 of the PC.

[21] The trial judge also found that even if there was grave and sudden provocation, however, the act of retaliation by the appellant is way out of
I proportion to the provocation received. His Lordship reasoned:

> Sekiranya si mati telah melakukan perbuatan yang mengakibatkan bangkitan marah yang besar dan mengejutkan (grave and sudden provocation) ke atas OKT, tindakan balas OKT adalah tidak wajar dengan tahap bangkitan marah yang diberi oleh si mati. Perbuatan OKT memukul si mati dengan menggunakan tukul besi di

> bahagian leher sebanyak lebih kurang 13 kali jelas adalah tidak wajar dengan apa-apa bangkitan marah yang diterima OKT. Perbuatan OKT jelasnya melebihi dari perkadaran provokasi yang diterimanya, jika ada (out of proportion to the provocation received).

[22] Again we were entirely with His Lordship. A perusal of the post mortem report ('exh P22') prepared by SP9 shows the raw savagery inflicted upon the deceased. In our view the 13 blows and the consequent injuries suffered by the deceased appears devoid of some proper and reasonable link to the kind of provocation offered by the act/conduct of the deceased. The severity of the retaliation bears no sense of proportionality nor comparison nor resemblance with the nature of the provocation offered by the deceased. As it were, the blows were deliberate acts meant to end the deceased's life – see *Che Omar Che Akhir v Public Prosecutor*; *Abdul Razak Dalek v Public Prosecutor*; *Asogan Ramesh s/o Ramachandren & Ors v Public Prosecutor* [1998] 1 SLR 286; *Koh Swee Beng v Public Prosecutor* [1991] 3 MLJ 401 – where the defence of sudden and grave provocation were rejected on account that there were no grave provocations as such and even if there were, the nature of the retaliations were grossly disproportionate with the nature of the provocations offered.

[23] It is pertinent to note that the appellant did not testify that he beat the deceased with the hammer in the manner he did on account of the grave and sudden provocation he received from the act/conduct of the deceased but in self-defence when the deceased struck him with a steel chair. Hence it is obvious that the beating of the deceased has nothing to do with issues of grave and sudden provocation. On this ground alone, the defence of grave and sudden provocation must fail.

RIGHT OF PRIVATE DEFENCE UNDER EXCEPTION 2

[24] Exception 2 of s 300 of the PC provides:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

This exception is to be read with s 96 of the Code which provides that nothing is an offence which is done in the exercise of the right of private defence. Section 99 sets the limits of this right and s 99(4) qualifies that the right of private defence does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

[25] The learned authors in *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) at p 1354 further postulates that the following cardinal conditions must have

existed before the taking of the life of a person is justified on a plea of self-defence.

(a) the accused must be free from fault in bringing about the encounter;

(b) there must be present an impending peril to life or of great bodily harm either real or so apparent;

(c) there must be no safe or reasonable mode of escape by retreat; and

(d) there must have been a necessity of taking life.

[26] In this regard at the risk of being repetitive, the appellant testified that the fight with the deceased in the hall moved to the kitchen area where the deceased struck him with a steel chair and he defended himself by beating the deceased with a hammer, which was the only thing he could use to defend himself. However, the trial judge rejected this defence and found it was mere afterthought on account that it was never put across to the prosecution witnesses in particular SP13 and the IO, SP15, but revealed only during the defence stage.

[27] We were most inclined to agree with His Lordship. Being the crux of his defence, it is only to be expected that these issues should feature prominently in the cross-examination of SP13 and SP15. It is trite that apart from his own testimony, his defence can equally be ascertained from the line of cross-examination of the prosecution witnesses. It is also incumbent upon the defence to put forth his case at the earliest possible stage.

[28] The appellant's failure to do so had occasioned a breach of the rule of essential justice, as apart from springing surprises, it also leaves no room for rebuttal, denial or explaination by the prosecution witnesses, particularly SP15. Indeed the prosecution were denied of the opportunity to verify the veracity of the appellant's evidence. As it were, the appellant's evidence has no chance of being tested and corroborated. In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, the Federal Court, at p 218, thus posited that:

> Speaking generally, in criminal trial, the whole point and purpose of the defence having to put its case to such prosecution witnesses as might be in position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were revealed for the first time when the accused makes his defence from the witness box or dock, thus detracting from the weight to be accorded to the defence.

[29] We were on common ground with the trial judge and thus have no hesitation in ruling that such failure by the appellant to put his case at the

earliest possible stage would render the same to be likened as an afterthought or a recent invention, incapable of being accorded the due weight it deserves – see also *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561.

[30] We also found that the appellant did not offer further evidence to substantiate his testimony that he was struck by the deceased using a steel chair before he retaliated by beating the deceased with a hammer. He must have had been struck severely for him to have retaliated in the manner he did. However the IO, SP15, who had visited the appellant's house, was not cross-examined regarding the said steel chair; whether there was such a chair; whether SP15 examined the said chair and whether SP15 seized the said chair. Equally SP15 was not cross examined as regards to the physical condition of the appellant when the appellant was handed to him; whether the appellant was injured or had suffered cuts, bruises and lacerations on account of the fight he had with the deceased and on account of the thrashing with the steel chair he had received and whether the appellant was later sent for medical examination. It was also not put to SP15 that the appellant had a fight with the deceased; that the deceased had struck him with a steel chair and that the appellant had beaten the deceased with a hammer in self-defence. In fact SP15 was not cross-examined at all.

[31] Equally SP12 and SP13 were not cross-examined regarding the existence of the steel chair in the kitchen area and whether the appellant had suffered injuries or bruises as a result of the fight with the deceased. These two witnesses were closest to the appellant and were staying with him. Surely they would be able to tell whether the said steel chair does exist and whether the appellant had indeed suffered injuries or otherwise. If their answers were in the affirmative, then it would lend credence to the appellant's testimony that the deceased had struck him with a steel chair and the appellant had retaliated in self-defence. But they were not asked. In fact both witnesses were not cross-examined at all.

[32] The incident took place in the wee hours of 20 August 2011. Barely 48 hours later at about 4.30am on 22 August 2011, the appellant was arrested by SP8. Again SP8 was not cross-examined regarding the appellant's physical condition in particular whether the appellant had suffered injuries to substantiate his claim that there was a fight and he was struck with a steel chair and he had acted in self-defence. SP8 went to the appellant's house to recover the hammer but yet nothing was asked about the steel chair allegedly used by the deceased to hit the appellant.

[33] The sum total of the evidence enumerated in paras 30, 31 and 32 above is this – the appellant had nothing to substantiate his testimony that he had acted in self-defence upon being struck with a steel chair by the deceased. It is a bare statement without more.

[34] We were of the further view that even if the exception apply, on the facts, the appellant had inflicted more harm than it is necessary to inflict for the purpose of defence. In cross-examination, the appellant testified that he beat the deceased with the hammer only once, causing immediate loss of consciousness (*pengsan*) to the deceased. That being the case, it is apparent that there is no longer an impending peril to his life or great bodily harm. He should then retreat and desist from inflicting further harm to the deceased.

[35] The appellant, instead of retreating, inflicted further blows upon the deceased as indicated in SP9's testimony, causing his eventual death. SP9 found at least 13 multiple overlapping circular and semi circular scratch marks (*luka calar*) and bruises (*luka lebam*) at the base of the right neck, close to each other, measuring 2.5cm to 3cm in diameter. In his conclusion (at p 3 of his post-mortem report exh P22) PW9 opined that:

> Saya berpendapat si mati telah mati akibat daripada dipukul atau dihentak berkali-kali dengan sejenis senjata tumpul yang berbentuk bulat pada bahagian hadapan leher. Akibat dari pukulan atau hentakan dari benda tumpul tersebut menyebabkan luka berganda pada leher seperti luka No 1 di atas dan menyebabkan pendarahan pada otot leher, patah 'Thyroid Cartilage Plates' dan kedua-dua 'Horns Thyroid Cartilage' dan 'Hyoid Bones'. Akibatnya berlaku pendarahan ke dalam salur pernafasan dan hingga membawa kematian.

Evidently, SP9's testimony had negated the appellant's evidence that he beat the deceased only once.

[36] It is very apparent that the appellant had exceeded the limits of the exercise of the right of his private defence. The repeated blows were not necessary anymore and there is no necessity of ending the deceased's life as the impending danger/peril to his life and limb no longer exists the moment the deceased passed-out upon infliction of the first blow.

[37] The repeated blows and the severity of the injuries inflicted upon the deceased merely disclosed the appellant's real intention. In our view, there can be no doubt that the repeated hammering of the deceased was meant to end his life. SP9 found six other injuries on the deceased's person as indicated at p 2 of his post-mortem report. In his conclusion SP9 further opined:

> Luka-luka No 2 hingga No 7 adalah luka-luka luaran yang mungkin terjadi apabila si mati di 'restrained' dan luka No 6 dan No 7 adalah luka yang menunjukkan kedua tangan si mati diikat atau ditahan atau digenggam.

> Saya berpendapat dengan keadaan luka pada leher dan luka-luka lain, si mati mungkin telah di 'restrained' atau dihimpit dalam keadaan terlentang, leher didongakkan dan kepala ditahan sebelum dipukul atau dihentak berkali-kali pada bahagian leher.

This evidence was not challenged by the defence. In fact SP9 was not cross-examined at all. Hence SP9's testimony is uncontroverted.

[38] In our view the appellant, who had inflicted the kind of blows inflicted upon the deceased in the manner described by SP9 (above) must have intended to kill the deceased. He is no longer acting in self-defence. Hence his reliance on exception 2 of the PC must also fail.

DEFENCE OF SUDDEN FIGHT UNDER EXCEPTION 4

[39] Exception 4 of s 300 of the PC provides:

> Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

The learned authors in *Ratanlal & Dhirajlal's Law of Crimes*, (25th Ed) at p 1363 postulates that four requisites must be satisfied to invoke this exception:

(a) it was a sudden fight;

(b) there was no premeditation;

(c) the act was committed in a heat of passion; and

(d) the assailant had not taken any undue advantage or acted in a cruel manner.

[40] The appellant's reliance on exception 4 also suffered the same deficiencies as was his reliance upon exception 1 and 2. This mode of defence was raised for the first time only at the defence stage. He failed to avail himself of the opportunity to put his essential and material case in cross-examination of the prosecution witnesses.

[41] More importantly we were of the view that this defence has no leg to stand on account that there was no evidence of any heated quarrel before the fight and that the appellant had indeed taken undue advantage of the deceased's haplessness and had equally acted in a very cruel or unusual manner as enumerated in paras 34, 35, 36 and 37 above. The manner the hammering blows were inflicted by the appellant upon the deceased as described by SP9 and reproduced at para 37 is most telling.

A

CONCLUSION

[42] For the reasons stated above, we find that the conviction of the appellant is safe. We were also satisfied that the trial judge had meticulously gone through and correctly appreciated the evidence before him. There were no appealable errors to warrant our intervention. Hence forth we dismissed the appeal before us and affirmed the conviction and sentence by the High Court.

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Appeal dismissed.

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Reported by Kohila Nesan

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